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No. 08-1259

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

TOBIAS WEISS, GERTRUDE O. WEISS,

Petitioners,

—v.—

EL AL ISRAEL AIRLINES, LTD.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether "service" in the express preemption provision of the Airline Deregulation Act, 49 U.S.C. § 41713(b)(1), refers only to "the provision of air transportation to and from various markets at various times" as interpreted by the Ninth Circuit in *Charas*,[1] or refers to "the provision or anticipated provision of labor from the airline to its passengers" as interpreted by the Second Circuit in *Weiss*,[2] in light of the reasoning in *Rowe*.[3]

II. Whether the tort law claim alleged by petitioners relates to a "service" and is, therefore, preempted by the express preemption provision of the Airline Deregulation Act, 49 U.S.C. § 41713(b)(1).

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[1] *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1266 (9th Cir. 1998) (*en banc*).

[2] *Weiss v. El Al Israel Airlines, Ltd.*, No. 07-4113, 2009 WL 367559, at *2 (2d Cir. Feb. 3, 2009) (internal quotation marks omitted).

[3] *Rowe v. New Hampshire Motor Transport Ass'n*, — U.S. —, 128 S. Ct. 989 (2008).

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent El Al Israel Airlines, Ltd. does not have a parent company.

KNAFAIM HOLDINGS LIMITED is a publicly held company that owns 10% or more of the stock of El Al Israel Airlines, Ltd.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is unpublished. It is unofficially reported at 2009 WL 367559 (2d Cir. Feb. 3, 2009) and is reproduced in the Appendix to the Petition for A Writ of Certiorari at A1a - A6a.[4] The opinions of the district court are officially reported at 433 F. Supp. 2d 361 (S.D.N.Y. 2006) (referred to herein as *Weiss I*) and 471 F. Supp. 2d 356 (S.D.N.Y. 2006) (referred to herein as *Weiss II* and reproduced in the Appendix to the Petition at A9a - A20a).

STATUTORY PROVISION INVOLVED

> **(b) Preemption.—(1)** Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.
>
> **(2)** Paragraphs (1) and (4) of this subsection do not apply to air transportation provided entirely in Alaska unless the transportation is air transportation (except charter air transportation) provided under a certificate issued under section 41102 of this title.

[4] References preceded by "A" refer to pages in the Appendix to the Petition for A Writ of Certiorari filed by Petitioners.

(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

(4) Transportation by air carrier or carrier affiliated with a direct air carrier.—

(A) General rule.—Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

(B) Matters not covered.—Subparagraph (A)—

(i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the author-

> ity of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and
>
> **(ii)** does not apply to the transportation of household goods, as defined in section 13102 of this title.
>
> (C) Applicability of paragraph (1).—This paragraph shall not limit the applicability of paragraph (1).

49 U.S.C. § 41713(b).

STATEMENT OF THE CASE

Plaintiffs[5] seek damages allegedly sustained as a result of having been "bumped" from their El Al flight on March 31, 2004. A23a - A25a.[6]

Plaintiffs had purchased tickets from EL AL for round trip air transportation between John F. Kennedy International Airport in New York ("JFK") and Ben-Gurion Airport in Jerusalem on a flight scheduled to depart on March 31, 2004. A22a. Upon their arrival at the airport, EL AL personnel

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[5] Petitioners were plaintiffs in the courts below and are referred to throughout this Brief in Opposition as "plaintiffs." Respondent El Al Israel Airlines, Ltd. was the defendant in the courts below and is referred to in this Brief as "defendant" or "El Al."

[6] The facts are taken from the plaintiffs' complaint, which must be accepted as true, inasmuch as the legal issue was raised in the context of a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6). *See Haddle v. Garrison*, 525 U.S. 121, 125 (1998).

informed plaintiffs that they had been bumped from their flight and that, although there would be a delay, they would be placed on a stand-by list and would eventually be seated on a later flight to Jerusalem. A23a - A24a. After returning to JFK over the next two days and being unsuccessful in obtaining transportation on El Al, plaintiffs purchased tickets on a British Airways flight. A23a.

In their complaint, plaintiffs alleged three claims for relief, all of which included the allegation that they were bumped from the El Al flight. A23a - A25a. Each claim for relief had an allegedly different legal basis. The Second Count, at issue here, sounds in tort and alleged that the conduct of El Al inducing plaintiffs to return to JFK for the possibility of taking a later El Al flight, in lieu of the flight from which they were bumped, was "wanton, oppressive, indifferent, and uncaring" that caused "emotional stress, and worry and anxiety, and great inconvenience" for which plaintiffs were entitled to damages "for their physical and emotional suffering and great inconvenience caused by the airline's failure to furnish the transportation represented by the tickets it sold to them and by the conduct of the airline and its employees." A24a - A25a.

El Al moved to dismiss plaintiffs' claims pursuant to FED. R. CIV. P. 12(b)(6) on the ground, *inter alia*, that plaintiffs' claims were preempted by the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. § 41713(b)(1).

The district court[7] found that the claim for "tort damages for physical and emotional suffering, and

[7] Jurisdiction in the district court was based upon federal question, 28 U.S.C. § 1331, and diversity of citizenship, 28 U.S.C. § 1332. *Weiss I*, 433 F. Supp. 2d at 363-64.

for great inconvenience . . . is clearly preempted by the ADA, and is dismissed." *Weiss I*, 433 F. Supp. 2d at 370 (internal quotation marks and citation omitted).[8] Plaintiffs then moved for reconsideration of the dismissal of their tort claim. In denying plaintiffs' motion for reconsideration, the district court expanded on its reasoning and upheld dismissal of the tort claim as preempted by the ADA. *Weiss II*, 471 F. Supp. 2d at 359-62, A13a - A20a.

On appeal, plaintiffs argued that their tort claim was not preempted by the ADA because their tort claim was not related to a "service" as interpreted by the Ninth Circuit in *Charas v. Trans World Airlines*, 160 F.3d 1259 (9th Cir. 1998) (*en banc*), and by the Third Circuit in *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3d cir. 1998). In *Charas* the Ninth Circuit interpreted "service" narrowly.

> "[S]ervice," when juxtaposed to "rates" and "routes," refers to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided (as in, "This airline provides service from Tucson to New York twice a day.") To interpret "service" more broadly is to ignore the context of its use; and, it effectively would result in the preemption of virtually everything an airline does.

Charas, 160 F.3d at 1265-66.

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[8] The First Count based upon failure to comply with federal regulations was dismissed on the ground that no private right of action existed. *Weiss I*, 433 F. Supp. 2d at 371. The Third Count for breach of contract was ultimately settled with plaintiff reserving a right to appeal dismissal of their tort claim in the Second Count. A7a - A8a.

The Second Circuit, however, had already expressly rejected the *Charas* interpretation of "service." *Air Transport Association of America, Inc. v. Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008) (hereinafter "ATA"). In *ATA* the court analyzed the effect of the ADA preemption provision on a New York statute requiring airlines to provide passengers with specific amenities during lengthy ground delays and, in holding that the statute was preempted, found that the interpretation in *Charas* was inconsistent with the broader reading of "service" in *Rowe v. New Hampshire Motor Transport Ass'n*, — U.S. —, 128 S. Ct. 989 (2008). *See ATA*, 520 F.3d at 223 ("in *Rowe* . . . the Court necessarily defined 'service' to extend beyond prices, schedules, origins, and destinations").

In this case, therefore, the Second Circuit applied its holding in *ATA* to the tort claim asserted by plaintiffs. The court, citing *ATA*, noted that "a majority of the circuits had found the term "service" to refer [ ] to the provision or anticipated provision of labor from the airline to its passengers and [to] encompass[ ] matters such as boarding procedures, baggage handling, and food and drink." *Weiss v. El Al Israel Airlines*, 2009 WL 367559, at *1, A5a (internal quotation marks omitted). It then affirmed dismissal of plaintiffs' tort claim, stating:

> The El Al actions challenged by the plaintiffs related "to the provision or anticipated provision of labor from the airline" within the meaning of *ATA* . . . Moreover, this case falls squarely within the rationale of *ATA*, which, relying on *Rowe*, stressed Congress's overarching goal of assur[ing] that transportation rates, routes, and services

> reflected maximum reliance on competitive market forces . . . Like an airline's failure to provide food or water to passengers stranded on the runway (which was at issue in *ATA* . . .), the practice of "bumping," although notoriously maddening to passengers, is a practice subject to competitive market forces. We therefore conclude that El Al's actions related to the airline's "service," and that the plaintiffs' tort claim is thus preempted by section 105 of the ADA.
> . . .

Weiss, 2009 WL 367559, at *2, A5a (internal quotation marks and citations omitted).

REASONS FOR DENYING THE PETITION

I. Any Split Among the Circuits has been Resolved by *Rowe v. New Hampshire Motor Transport Ass'n*, — U.S. —, 128 S. Ct. 989 (2008)

The Second Circuit essentially acknowledged that its decision conflicted with the decisions of the Ninth Circuit in *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1266 (9th Cir. 1998) (*en banc*), and the Third Circuit in *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3d cir. 1998),[9] interpreting

[9] Although Justice O'Connor stated that the "Third Circuit has expressly agreed with [the Ninth Circuit's] approach" (*Northwest Airlines, Inc. v. Duncan*, 531 U.S. 1058, 1058 (2000) (O'Connor, J., dissenting to denial of *cert.*)), there is a question as to the extent which the Third Circuit has adopted the Ninth Circuit's interpretation of "service." *Khan v. American Airlines, Inc.*, No. 08 CV 5246, 2008 WL 5110852, at *3 n.3 (S.D.N.Y.

§ 41713(b)(1). *Weiss v. El Al Israel Airlines, Ltd.*, 2009 WL 367559, at *1, A4a. Both *Charas* and *Taj Mahal*, however, were decided before the Court's decision in *Rowe v. New Hampshire Motor Transport Ass'n*, — U.S. —, 128 S. Ct. 989 (2008), interpreting 49 U.S.C. § 14501(c)(1). And although *Rowe* dealt with the preemptive effect of § 14501(c)(1), because the preemption language in § 14501(c)(1) was copied from § 41713(b)(1) the analysis in *Rowe* relied upon the decisions in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), and *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), interpreting § 41713(b)(1).

Inasmuch as the *Charas* court concluded that "service" in § 41713(b)(1) is limited "to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided" while *Rowe* found that the regulation of the manner in which a motor carrier provided delivery services of tobacco products in Maine was preempted under § 14501(c)(1) as a "service," it is abundantly clear that the term "service" in § 41713(b)(1) cannot be limited to encompass only the frequency and scheduling of transportation or selection of transportation markets. As such, the Second Circuit was correct to find that *Charas* is inconsistent with *Rowe*. *ATA*, 520 F.3d at 223; *Weiss*, 2009 WL 367559, at *1. Presumably the Ninth Circuit and Third Circuit would reach the same conclusion, thus rendering unnecessary any need for this Court to consider again the meaning of "service" in § 41713(b)(1).

Moreover, the rationale and principles enunciated in *Rowe* are only now being considered by courts in

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Nov. 26, 2008); *see Panitch v. Continental Airlines*, No. 06-3611, 2008 WL 906240, at *5 (D.N.J. Mar. 31, 2008).

the Ninth Circuit.[10] *See American Trucking Ass'n v. City of Los Angeles*, 559 F.3d 1046, 1053 (9th Cir. 2009) (holding, in light of *Rowe*, that 49 U.S.C. § 14501(c)(1) likely preempts provisions of mandatory concession agreement with City relating to "service" and entitling plaintiffs to preliminary injunction); *Blackwell v. Skywest Airlines, Inc.*, No. 06 CV 0307, 2008 WL 5103195, at *16 - *18 (S.D. Cal. Dec. 3, 2008) (finding preemption by § 41713(b)(1) of state wage law claims under *Charas* without reliance on *Rowe*); *but see Hanni v. American Airlines, Inc.*, No. 08-00732, 2008 WL 1885794, at *6 - *7 (N.D. Cal. 2008) ("the Ninth Circuit's definition of 'service' in *Charas* does conflict with the Supreme Court's subsequent opinion in *Rowe*, which 'necessarily defined "service" to extend beyond prices, schedules, origins, and destinations' " but rationale of *Rowe* not applicable to state-based tort law claims). Under the circumstances, the Ninth Circuit should be given the opportunity to reconsider its interpretation of § 41713(b)(1) in *Charas* in light of *Rowe*, and it is unnecessary for this Court to devote scarce judicial resources to correct an interpretation that is highly likely to be rendered an historical anomaly in the near future.

II. Independent State Law Grounds Exist to Affirm the Decision Below and it is Unnecessary to Resolve any Arguable Split Among the Circuits

It is well-settled that a party may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even

[10] As of the date of this Brief in Opposition, it does not appear that the Third Circuit has considered the effect of *Rowe* on *Taj-Mahal*.

considered by the District Court or the Court of Appeals." *14 Penn Plaza LLC v. Pyett*, — U.S. —, 129 S. Ct. 1456, 1474 (2009) (internal quotation marks omitted), *quoting Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989). Pursuant to SUP. CT. R. 15.2, defendant El Al advises that in the event a Writ of Certiorari is granted it will argue that the decision below may be affirmed on independent state law grounds.[11]

Plaintiffs' underlying claims for inconvenience and alleged mistreatment in the terminal at JFK, standing alone, have no basis in state law regardless of whether or not they stem from the bumping. Plaintiffs claimed that the actions of El Al were "wanton, oppressive, indifferent, and uncaring" causing "emotional stress, and worry and anxiety, and great inconvenience . . . [and] physical and emotional suffering." A25a. Although not denominated as such, plaintiffs' claims in the Second Count of the complaint are akin to intentional or negligent infliction of emotional distress.

Under New York law a cause of action for intentional infliction of emotional distress must allege conduct that is so outrageous and extreme that it is beyond the bounds of decency. *E.g.*, *McRedmond v. Sutton Place Restaurant & Bar, Inc.*, 851 N.Y.S.2d 478, 479, 48 A.D.3d 258 (1st Dept. 2008) ("a cause of action for intentional infliction of emotional distress must be supported by allegations of conduct 'so outrageous in character, and so extreme in degree, as to

[11] The argument outlined here was presented to, but not considered by, the Second Circuit below. *See* Brief for Defendant-Appellee El Al Israel Airlines, Ltd. at 21-23, *Weiss v. El Al Israel Airlines, Ltd.*, No. 07-4113, 2009 WL 367559 (2d Cir. Feb 3, 2009). The argument was not presented to the district court.

go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community' ") (internal citation omitted); *Stauber v. New York City Transit Authority*, 781 N.Y.S.2d 26, 27, 10 A.D.3d 280, 281 (1st Dept. 2004).

In the context of evaluating whether or not the alleged activities of El Al constituted a "service" so as to be preempted, the district court had concluded that plaintiffs' claims regarding El Al's alleged conduct were not outrageous or extreme.

> [E]ven assuming that plaintiffs' allegations are true, as a matter of law the conduct described by plaintiffs does not rise to the level of outrageous or unreasonable behavior. Plaintiffs allege no assault, battery, false arrest, false imprisonment, slander, or any similar action that could be described as outrageous or unreasonable. Rather, plaintiffs merely allege the sort of rude, indifferent, and uncaring treatment that is all too common in customer service businesses.

Weiss II, 471 F. Supp. 2d at 362; A19a. That same conclusion applies if plaintiffs' tort claims are evaluated under New York law. Plaintiffs claims in the Second Count were, therefore, properly dismissed even if they could be considered separate and distinct from a "bumping" claim that is preempted by the ADA.

In the event El Al is correct in arguing that plaintiffs' tort claim is not legally viable under New York law, it will be unnecessary for this Court to consider whether or not plaintiffs' tort claim is preempted by the ADA. Under such circumstances, the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: New York, New York
May 14, 2009

Respectfully submitted,

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